

RANDY D. MAJOR
Claimant

VS.

MOBIL OIL CORPORATION
Respondent

AND

SELF-INSURED
Insurance Carrier

The two issues to be decided on appeal are:

- (1) Claimant's average weekly wage; and,
- (2) Nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) Although the record relating to average weekly wage is deficient in several respects, the Appeals Board finds that claimant's average weekly wage on the date of accident is \$922.66. The evidence barely meets claimant's burden.

Calculation of wage depends first on whether claimant was paid on an hourly basis or otherwise. K.S.A. 44-511. Although claimant did testify, he was not asked whether he was paid hourly. The record does otherwise generally suggest that he was paid hourly. There are records of earnings introduced which appear to be on an hourly basis. They do not, however, permit a precise calculation of the hourly wage without further testimony and none is provided. Claimant's vocational expert, Michael Dreiling, indicates in his report that claimant was paid on an hourly basis. Although not certain, the Appeals Board finds that claimant probably was paid on an hourly basis and the calculation of his average weekly wage should therefore be based upon the calculation used for employees so paid.

Having determined the wage was hourly, we must next determine the hourly rate. The Appeals Board notes parenthetically that the Administrative Law Judge has used total annual earnings to arrive at the weekly wage. While this is not the method to be used for hourly employees, the annual earnings were undoubtedly used because of the absence of other clear evidence. The record does reflect, however, that claimant advised Mr. Dreiling that he earned approximately \$17.00 per hour. This testimony is un-rebutted. Because it is un-rebutted, the Appeals Board finds that \$17.00 per hour is the most probable hourly rate. Pursuant to K.S.A. 44-511, this hourly rate is then multiplied by forty (40) hours per week to arrive at the base pay of \$680.00 per week.

The weekly value of terminated fringe benefits is also unclear from the record. Claimant introduced a number of records that suggest claimant enjoyed a substantial fringe benefit package. The exact weekly value is not shown and cannot be calculated from the evidence introduced. In order to arrive at a value, the Administrative Law Judge has adopted the statement in the respondent's submission letter that the value of fringe benefits was at least \$120.00 per week. However, the record also contains the testimony of vocational expert, Michael Dreiling, given after his review of the documents relating to the general fringe benefit package. He testified that those fringe benefits would have a value of at least of thirty-five percent (35%) of claimant's hourly rate. This testimony is, again, un-rebutted. The Appeals Board therefore adopts and applies the thirty-five percent (35%) factor. This brings the average weekly wage at the time of the injury to \$918.00.

Finally, the wage records introduced do show that claimant worked at least five hours of overtime in the twenty-six (26) weeks preceding the accident date. For that he was paid \$121.20. This gives an average weekly overtime pay of \$4.66 for the twenty-six weeks (26) and as required by statute this will be added to bring the average weekly wage to \$922.66. This wage will be used for calculation of the benefits.

- (2) Claimant has a thirty-one and one-half percent (31.5%) work disability.

In determining work disability, the Appeals Board considers both loss of ability to obtain work in the open labor market and loss of ability to earn a comparable wage. In this case, only one vocational expert, Michael Dreiling, testified. He testified, on the basis of the restrictions of Dr. Reiff Brown, that the claimant had a ten percent (10%) loss of access to the open labor market as a result of his injury. The Appeals Board therefore finds that claimant does, in fact, have a ten percent (10%) loss of access to the open labor market.

Michael Dreiling gives several calculations of loss of ability to earn a comparable wage. His final conclusion is that claimant has a seventy-one percent (71%) loss of ability to earn a comparable wage. This is based upon a comparison of \$17.00 per hour or \$680.00 per week to the \$200.00 per week claimant was earning in his job as an insurance salesperson after the accident. From the testimony of the claimant and Michael Dreiling, the Appeals Board believes that while seventy-one percent (71%) may be the upper limit of the loss, a fifty-three percent (53%) loss of ability to earn a comparable wage is more probable. Claimant testified that he receives a base pay of \$12,000.00. He also testifies that he is paid on a commission basis and that he is earning more than the base pay. He gave a figure of over \$5,000.00 as his earnings to date but does not testify as to the period in which this was earned. Michael Dreiling's testimony provides two other figures which need to be considered. He first indicates that from claimant's background he could be expected to earn \$9.75 or \$390.00 per week in mechanical work which is within his restrictions. He also testifies that the average earning in Kansas for a beginning insurance salesman is \$22,464 per year or \$432.00 per week. From these figures, the Appeals Board believes, considering all the facts and circumstances, that the \$432.00 per week is the most appropriate figure to use for the post-injury wage factor in the calculation. When the \$432.00 wage is used and compared to the actual pre-injury wage of \$922.66, the result is a fifty-three percent (53%) loss of ability to earn a comparable wage.

The Appeals Board is not required to weigh equally loss of access to the open labor market and loss of ability to earn a comparable wage. See Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991). However, in this case there appears no compelling reason to give either factor a greater weight and accordingly they will be weighted equally. The result is a split between the ten percent (10%) loss of access and the fifty-three percent (53%) loss of ability to earn a comparable wage resulting in a thirty-one and one-half percent (31.5%) work disability which the Appeals Board considers to be an appropriate basis for the award in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award of compensation is entered in accordance with the above findings in favor of the claimant, Randy D. Major, and against the respondent, Mobil Oil Corporation, a qualified self-insured, for an accidental injury occurring on January 10, 1992.

The claimant is entitled to 51.86 weeks temporary total disability at the rate of \$289.00 per week or \$14,987.54 followed by 363.14 weeks at \$193.77 per week or \$70,365.64 for a 31.5% permanent partial general disability making a total award of \$85,353.18.

As of June 30, 1994 there would be due and owing to the claimant 51.86 weeks temporary total compensation at \$289.00 per week in the sum of \$14,987.54 plus 77 weeks permanent partial compensation at \$193.77 per week in the sum of \$14,920.29 for

a total due and owing of \$29,907.83 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$55,445.35 shall be paid at \$193.77 per week for 286.14 weeks or until further order of the Director.

Claimant is awarded \$2,514.20 in medical mileage.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent to be paid direct as follows:

Underwood & Shane	
Transcript of proceedings	\$212.10
Underwood & Shane	
Deposition of Dr. Brown	\$136.00
Hostetler & Associates, Inc.	
Deposition of Michael Dreiling	\$172.50

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gerald O. Schultz, 302 Fleming, Suite 5, Garden City, KS 67846
B. G. Larson, Box 1472, Dodge City, KS 67801
Thomas F. Richardson, Administrative Law Judge
George Gomez, Director